Supreme Court, U.S.
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Case No. _____

IN THE
Supreme Court Of The United States

Douglas L. Fowlkes
Petitioner,

vs.
United States of America
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the decision of this Court in *United States v. Sun Diamond Growers of California*, 526 U.S. 398, 119 S.Ct. 1402, 143 L.Ed.2d 576 (1999) imposing a quid pro quo element on a bribery charge under 18 U.S.C. Section 201(c) applies to a bribery charge under 18 U.S.C. Section 666?

2. Whether it is a violation of 18 U.S.C. Section 201(c)(2) for Federal prosecutors to give things of value to fact witnesses in exchange for or because of their testimony in Federal criminal trials?

3. Whether it unconstitutionally burdens a criminal defendant's right to testify for the Federal prosecutor to vouch to the jury for the truthfulness of a Government witness who has entered into a plea agreement with the said Federal prosecutor and in accordance therewith has testified against the defendant?

4. Whether it is a violation of a criminal defendant's Due Process rights for the Federal prosecutor to vouch to the jury for the truthfulness of a Government witness who has entered into a plea agreement with the said Federal prosecutor and in accordance therewith has testified against the defendant?

5. Whether Petitioner has made a substantial showing of deprivation of the constitutional right to the effective assistance of counsel?

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OPINIONS BELOW

On April 4, 2000, the United States District Court for the Northern District of Georgia entered an order denying Petitioner's 28 U.S.C. Section 2255 motion. Judgment was entered on this order on April 10, 2000. (A copy of this order and judgment is attached hereto as Appendix A). The district court entered an order denying Petitioner a certificate of appealability of the denial of his Section 2255 motion on May 18, 2000. (A copy of this order is attached hereto as Appendix B). On August 17, 2000, a judge of the United States Court of Appeals for the Eleventh Circuit denied Petitioner a certificate of appealability of the district court's denial of his Section 2255 motion. (A copy of this order is attached hereto as Appendix C).

JURISDICTION

This Court has jurisdiction pursuant to *Hohn v. United States*, 524 U.S. 236, 118 S.Ct. 1969, 1972, 141 L.Ed.2d 242 (1998).

STATUTES AND RULES INVOLVED

The following statutes and rules are involved and are set out in Appendix D: 18 U.S.C. Section 666; 18 U.S.C. Section 201; 28 U.S.C. Sections 2253 and 2225; Federal Rule of Evidence 403.

STATEMENT OF THE CASE

The Petitioner in this case was for more than thirty-five years a member of the Atlanta City Council and the head track coach at Georgia Tech. He reached the age of 63 years without being either charged or convicted of any crime and with a sterling reputation. This is a case in which Petitioner asserts his actual innocence. This is a case in which the *sole* evidence against Petitioner was the testimony of a self-confessed liar and swindler, Echols, who gave his testimony against Petitioner in ex-

change for retention of $1.5 million in admittedly illegally obtained assets and charging and sentencing leniency from the Government allowing Echols to avoid imprisonment. In addition to the money, Echols served a few months in home confinement instead of the many years imprisonment called for by the U. S. Sentencing Guidelines for his admitted criminal acts.

On May 17, 1994, a Federal grand jury in the Northern District of Georgia returned a 55 count superseding indictment against the Petitioner. Counts 1 through 49 charged that the Petitioner received corrupt payments from Echols, one of the principal concessionaires at the Atlanta Airport, in violation of 18 U.S.C. § 666. Counts 50 through 55 charged Petitioner with failing to report on his income tax returns cash payments and other gifts from Echols in violation of 26 U.S.C. § 7206(1).

Petitioner pled not guilty to all charges. A jury acquitted Petitioner of 51 of the 55 counts. The jury convicted the Petitioner of only one of the 49 bribery charges, Count 49, which involved an alleged payment of $350.00. Echols and the Government set up a breakfast meeting at the end of which Echols for the benefit of the Government's hidden cameras slipped $350 into Petitioner's coat pocket. Petitioner testified that he thought the money was for his retirement party which was being planned at that time and for which contributions were being solicited. The probation officer preparing the Presentence Report was forced to admit that, "Echols further stated that this gift [$350.00] was not for any specific official action on Fowlkes' part." (Presentence Report, par. 15, page 4)

The jury convicted Petitioner of three of the failure to report income charges, Counts 50, 51, and 53. The basis of this conviction is unknown in view of the acquittal on the bribery charges. The probation officer preparing the Presentence Report could only guess as to the basis for these income tax convictions since Petitioner was not convicted of bribery for any of the years in which he was alleged to have under-reported income.[1]

---

[1] The Presentence Report states: "Since the [Petitioner] was not charged with bribery in 1987 [a year for which the underreporting of income allegedly took place], and was acquitted of all other counts of bribery, *it is the probation officer's position* that the tennis bracelet, the airline tickets, and the Hertz rental car are the bases for the defendant's conviction in the tax offenses, Counts 50, 51, and 55. The value of these items are approximately $2,6876 which represents the total unreported income for the tax years 1987, 1988, and 1992." (emphasis added)

The district court sentenced Petitioner on October 14, 1994, to 41 months incarceration on Count 49 and 36 months on each of Counts 50, 51, and 53, to be served concurrently, three years of supervised release on Count 49 and one year on each of the other counts, to be served concurrently, and to pay a fine of $25,000.00. The Petitioner has now completed serving the incarceration portion of his sentence and is at home on supervised release.

The case was appealed to the United States Court of Appeals for the Eleventh Circuit and affirmed by an unpublished opinion filed on October 25, 1996. Petitioner filed a petition for a writ of certiorari in this Court. It was denied.

Following the denial of certiorari by the Supreme Court, Petitioner began serving his sentence of incarceration and filed a timely action under 28 U.S.C. § 2255 seeking post-conviction relief. On April 4, 2000, the district court entered an order denying relief. Judgment was entered on this order on April 10, 2000. (A copy of this order and judgment is attached hereto as Appendix A) Notice of Appeal was filed on May 4, 2000. A motion for a certificate of appealability was filed in district court. The district court denied a certificate of appealability without opinion on May 18, 2000. (A copy of this order is attached hereto as Appendix B) A motion for a certificate of appealability was filed in the United States Court of Appeals for the Eleventh Circuit. On August 17, 2000, a judge of the court of appeals denied a certificate of appealability. (A copy of this order is attached hereto as Appendix C).

REASONS THE WRIT SHOULD BE GRANTED

The Denial of a Certificate of Appealability Was Erroneous As Petitioner Made a Substantial Showing of the Denial of His Constitutional Right To a Jury Instruction On the Elements of the Charged Criminal Offense As Defined In *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 119 S.Ct. 1402, 143 L.Ed.2d 576 (1999)

Petitioner seeks a certificate of appealability of the denial of his 28 U.S.C. Section 2255 motion for post-conviction relief. The Petitioner in order to obtain a certificate of appealability must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. Section 2253(c)(2). Petitioner has made a substantial showing that the district court contrary to the decision of this Court in *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 119 S.Ct. 1402, 143 L.Ed.2d 576 (1999) denied him the right to Due Process by refusing Petitioner's request to instruct the jury that a quid pro quo is an essential element of the offense charged, 18 U.S.C. Section 666. *Sun-Diamond* was decided after Petitioner's appeal was concluded. It applies to this case on collateral review. The *Sun-Diamond* decision is applicable to cases on collateral review because it is an interpretation of the elements of the offense of "bribery" under the Federal statutes and not a "new rule" of constitutional law. *Bousley v. United States*, 523 U.S. 614, 620, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998)

At his trial, Petitioner moved for a judgment of acquittal on the 18 U.S.C. Section 666 charges based on the failure of the Government to offer any evidence of a quid pro quo. The district court denied the motion. Petitioner moved the district court to instruct the jury that a quid pro quo is an essential element of a violation of Section 666. The district court refused to do so. Both the district court and the court of appeals denied a certificate of appealability on this ground.

In *United States v. Sun-Diamond Growers of California*, the issue presented was whether or not a violation of 18 U.S.C.

Section 201(c), could be established by the Government without proof of some sort of link between the alleged corrupt payment and a specific act. The Court first noted that the statute created two pairs of crimes, bribes for giver and receiver and gratuities for the giver and receiver. Proof of bribery, the more serious offense in the Federal statutory scheme, requires the Government to establish a quid pro quo. The "gratuity" portion of the statutory scheme does not require proof of a "quid pro quo", but does require that the Government prove beyond a reasonable doubt a link between a thing of value conferred upon a public official and a specific "official act" for or because of which it was given.

> "The distinguishing feature of each crime is its intent element. Bribery requires intent "to influence" an official act or "to be influenced" in an official act, while illegal gratuity requires only that the gratuity be given or accepted "for or because of" an official act. *In other words, for bribery there must be a quid pro quo—a specific intent to give or receive something of value in exchange for an official act.* An illegal gratuity, on the other hand, may constitute merely a reward for some future act that the public official will take (and may already have determined to take), or for a past act that he has already taken..." (emphasis supplied) (526 U.S. at 404)
>
> "We hold that, in order to establish a violation of 18 U.S.C. Section 201(c)(1)(A), the Government must prove a link between a thing of value conferred upon a public official and a specific "official act" for or because of which it was given." (526 U.S. 398, 413)

The Petitioner argued in his Section 2255 motion that the *Sun-Diamond* case governed the definition of "bribery"

throughout the Federal statutory scheme, including 18 U.S.C. Section 666, and imposed a "quid pro quo" element on every Federal bribery offense. The district court erred in denying that claim. (Appendix A) It failed to distinguish between the "bribery" and the "gratuity" elements of the *Sun-Diamond* opinion. First, the district court erroneously held that the only statutory language "discussed" in *Sun-Diamond* was 18 U.S.C. § 201(c)(1)(A), the gratuity section of the statute at issue. (Appendix A at 6) This Court in *Sun-Diamond* in a lengthy discussion clearly distinguished the gratuity section, 18 U.S.C. Section 201(c)(1)(A), and the bribery section, 18 U.S.C. Section 201(b), of the statute at issue.

Second, the district court failed to distinguish in its order denying Petitioner's Section 2255 motion the jury instruction given by the district court in *Sun-Diamond* on the gratuity charge, from the jury instruction given by that district court on the bribery charge. (Appendix A at 7) This Court specifically noted in *Sun-Diamond* that, "The District Court's instructions in this case, in differentiating between a bribe and an illegal gratuity, correctly noted that only a bribe requires proof of a quid pro quo."

Third, the district court simply ignored the fact that this Court in *Sun-Diamond* specifically held that bribery as a Federal crime requires proof of a quid pro quo: "The distinguishing feature of each crime is its intent element. Bribery requires intent 'to influence' an official act or 'to be influenced' in an official act, while illegal gratuity requires only that the gratuity be given or accepted 'for or because of' an official act. In other words, for bribery there must be a quid pro quo—a specific intent to give or receive something of value in exchange for an official act."

The bribery sections of 18 U.S.C. Sections 201(b) and 666 are in relevant respects identical. Accordingly, the *Sun-Diamond* "quid pro quo" requirement for bribery in the Federal statutory scheme makes clear that in order for the Federal government to prove a violation of the Federal crime of bribery,

whether under Section 201 (b) or Section 666, it is required to prove beyond a reasonable doubt a quid pro quo.

In the Petitioner's case, the Government offered no evidence of a quid pro quo. In fact, as noted above, the Government's hired witness, Echols, specifically testified that the $350.00 at issue in this case was *not* in exchange for any specific act or acts. Nevertheless, despite the specific request of Petitioner's trial counsel, the district court refused to instruct the jury that an element of the offense the Government was required to prove beyond a reasonable doubt was a quid pro quo. The Petitioner was thus denied Due Process by being convicted on insufficient evidence of an unproven offense by a jury unaware of an essential element of the offense. Petitioner has made a substantial showing of the denial of a constitutional right. This issue should be certified for appeal.

Petitioner Has Made a Substantial Showing That He Was Denied His Constitutional Right to the Effective Assistance of Counsel As Required By the Sixth Amendment

Criminal defendants are under the Sixth Amendment entitled to the effective assistance of counsel in their defense. In *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the Court held that ineffective assistance of counsel is composed of two elements: (1) representation falling below a reasonable standard of care, and (2) prejudice as a result. *Strickland* further holds that the issue of ineffective assistance of counsel is a mixed question of law and fact subject to de novo review. (*Id.* at 698)

The Petitioner asserts that he received ineffective assistance of counsel in violation of his Sixth Amendment rights because of the following errors of counsel.

Counsel was constitutionally ineffective for failure to object to and seek to exclude the testimony of the Government witness, Harold Echols, who was allowed by the Government to retain $1.5 million of his illegally obtained assets and given sentencing and charging concessions by the Government as to his

admitted criminal conduct in exchange for and because of his testimony against Petitioner, which testimony constituted the sole evidence against Petitioner.

The district court in denying Petitioner's Section 2255 motion held that any objection on this ground was foreclosed by *United States v. Lowery*, 166 F.3d 1119 (11th Cir. 1999). (Appendix A at 5) The decision in *Lowery* was, "...we hold that agreements in which the government trades sentencing recommendations or other official action or consideration for cooperation, including testimony, do not violate 18 U.S.C. S 201(c)(2)." (166 F.3d at 1124

Petitioner first contends that *Lowery* was wrongly decided because it ignored the plain language of the statute. Section 201(c)(2) states that it applies to "whoever" gives a thing of value in exchange for or because of a witness's testimony. The rationale in *Lowery* was that despite the "whoever" language, the prohibitions of Section 201(c)(2) do not apply to Government prosecutors, but only apply to defense counsel. The basis for this conclusion was that if such prohibitions did apply to Federal prosecutors, defense counsel would have raised the issue much earlier since it is the usual practice of Federal prosecutors to use compensated witnesses to prove their cases *Id.* Thus, according to *Lowery*, a sort of estoppel bars present assertion of the plain language of the statute by defense counsel because defense counsel have not asserted the plain language in the past.

Not only does *Lowery* disregard the plain language of Section 201(c)(2), it disregards a basic human right protected by the statute and necessarily incorporated in the Due Process Clause the right not to be convicted on criminal charges based on testimony procured by Government prosecutors from witnesses by means of money or agreements in which the prosecutors trade sentencing recommendations, or other official consideration for testimony.

Petitioner contends, the statute must be enforced according to its plain language "whoever it affects. Section 201(c)(2) states that its prohibitions apply to "whoever" violates them. There is

no rational basis for a court to conclude that Government prosecutors are not included within the unlimited term "whoever". Petitioner relies upon the reasoning set out in the initial panel opinion in *United States v. Singleton*, 144 F.3d 1343 (10th Cir.1998), *rev'd en banc*, 165 F.3d 1297 (10th Cir.1999). Even though the Tenth Circuit reversed the panel opinion, Petitioner submits that its reasoning and logic is unassailable and the legal authorities cited therein conclusive that the prohibitions of Section 201(c)(2) do apply to Federal prosecutors.

In any event, this Court has not ruled on the application of "whoever" in 18 U.S.C. Section 201(c)(2) to Federal prosecutors making it unlawful for them as well as defense counsel to give a thing of value in exchange for or because of the testimony of a fact witness in a Federal trial. Petitioner submits that he has made a substantial showing that the testimony of Echols was procured in violation of 18 U.S.C. 201(c)(2) and that without that illegal testimony there was no evidence on which to convict him.

Petitioner's defense counsel fell below a reasonable standard of care in failing to make objection to the admission of Echols's testimony. The law of the Eleventh Circuit at the time of Petitioner's trial, 1994, clearly required the exclusion of the testimony of compensated Government fact witnesses on proper objection. In *Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters*, 117 F.3d 1328 (llth Cir. 1997), the court affirmed the decision of the United States District Court for the Southern District of Florida in the same case excluding the testimony of fact witnesses obtained by the exchange of things of value because of the violation of the Florida Rules of Professional Conduct prohibiting a lawyer from "offering an inducement to a witness that is prohibited by law." (117 F.3d at 1335 n.2). The district court held: "The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee." (865 F.Supp. 1524)

The district court further held that the fact the fee was paid by Lloyds Underwriters and not the lawyers did not avoid

the effect of the rule as the lawyers for Lloyds had, "played an active and extensive role in determining whether and what monetary sum a particular individual should receive." (865 F.Supp. at 1526). This is, of course, true of the Federal prosecutors who reached the plea agreement with Echols in this case. The district court adopted the decision in *The Florida Bar v. Jackson*, 490 So.2d 935(Fla. 1986) holding that it is improper for a lawyer to request that his clients be paid for fact testimony. Accordingly, the district court ruled that, "The court finds that the exclusion of all evidence tainted by the ethical violations is proper and appropriate." (*Id.* at 1526). This ruling was affirmed by the Eleventh Circuit at 117 F.3d 1335 n. 2.

Contracts to pay fact witnesses have been considered void as violations of public policy for many years. Such contracts also fail for lack of consideration. Plea agreements in Federal criminal cases are interpreted and applied on contractual principles. *United States v. Jefferies*, 908 F.2d 1520, 1523 (11th Cir. 1990); *United States v. Nyhuis*, F.3d 731, 741-742 (11th Cir. 1993); *United States v. McQueen*, 108 F.3d 64, 66 (4th Cir. 1997); and *Hentz v. Hangett*, 71 F.3d 1169, 1173 (5th Cir.) *cert. denied*, 116 S.Ct. 913 (1996). Therefore, the above long-standing contractual prohibitions apply to the Echols plea agreement in this case.

Moreover, Federal prosecutors are subject to the ethics rules of the state where they perform their duties. *United States ex rel. Olkeefe v. McDonnell Douglas Corporation*, 132 F.3d 1252, 1257 (8th Cir. 1998). Congress passed a statute, 28 U.S.C. 530 B(c) codifying the existing rule that Federal prosecutors are subject to state bar association ethics rules.

Echols in a plea agreement negotiated by Federal prosecutors agreed to testify against Petitioner and in exchange for his testimony received form the Government the right to retain more than $1.5 million in illegally obtained assets which he otherwise would have lost. The charging and sentencing benefits received by Echols are the same as money payments for purposes of the *Golden Door* rule. *United States v. Nilsen*, 967 F.2d

539, 542-543 (llth Cir. 1992), cert. denied, 507 U.S. 1034 (1993). ("...the phrase 'thing of value' is a clearly defined term that includes intangible objectives ..." (*Id.*. at 543)). The benefits received by Echols, in addition to the $1.5 million, had inestimable value to him. What is it worth not to spend years of life in prison? The testimony of Echols was due to be excluded from evidence on proper objection. The correct interpretation of Section 201(c)(2) makes the same rule applicable today. It was clearly ineffective assistance of counsel for Petitioner's defense counsel to fail to object as the prejudice is also clear, i.e., without Echols testimony there was no evidence against Petitioner.[2]

Moreover, in the instant case the agreement between Echols and the Government unconstitutionally burdened Petitioner's right to testify in his own behalf in that the Government vouched for the truthfulness of Echols's testimony by continually reminding the jury that if Echols did not tell "the truth", the Government would give him no rewards. The only rational way that this could be understood by the jury was that the Government was screening Echols's testimony for any untruths and that the jurors could rely on their Government to make certain that Echols was telling the truth. The prosecutor reassured the jury in her closing argument that it could rely on Echols because the Government was screening his testimony for the jury:

> "Now, if Harold Echols is not truthful, or if he falsely implicates someone else, his deal is off. And not only is his deal off, but everything he has told the Government about all these other payments that he's made to other people can be

2 There was never any evidence that Petitioner had voted on any matter affecting Echols except in accordance with the recommendations made by the Atlanta city administrative staff. Since there was no evidence that the administrative staffs were bribed or otherwise illegally influenced, there could be no quid pro quo.

> used against him. And we can put agent Tucker up on the stand to testify about everything he said. So if Harold Echols has so much self-interest, which clearly he does, I mean every person in the world is self-interested, it works to his detriment to lie now. It works to his benefit to tell the truth."

The Government's cross-examination of Petitioner and the Government's argument to the jury that Petitioner was lying, on the other hand, constituted the opposite message from the Government to the jurors. Thus, the Government vouched for Echols. This unconstitutionally burdened Petitioner's right to testify in his own behalf. Yet, Petitioner's defense counsel made no objection. Petitioner has made a substantial showing of the denial of a constitutional right. This issue should be certified for appeal.

Counsel was constitutionally ineffective for failing to object to the admission into evidence of the staged audio and videotapes of the January 6, 1993, meeting between Echols and Petitioner. Echols was unable to get a single incriminating statement from Petitioner on either tape. In fact, Petitioner stated on the tape that Echols did not have to give him any money. The point of the tape was to show Echols shoving an envelope of money into Petitioner's pocket. Petitioner explained that he thought the money was for his retirement party. There was no dispute that a retirement party was being planned at that time, that contributions to the party were being solicited by Petitioner's friends, and that such a retirement party was eventually held. Thus, in view of the admission by Echols that the $350.00 stuffed into Petitioner's pocket was for no particular purpose or act by Petitioner, the video was irrelevant and immaterial. Yet, Petitioner's defense counsel failed to object. This was ineffective assistance of counsel.

Moreover, even if the video tape had been relevant to some issue in the case, Federal Rule of Evidence 403 provides

that relevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice. In the matter of these tapes, one of the participants is acting out a pre-arranged script for which he has been promised great rewards while the other participant is under the belief that an ordinary meeting is going on. Innuendo and suggestive behavior by the "actor" is easily used to "set-up" the other party who is guided by the ordinary rules of courtesy. This case does not involve a drug deal. On the face of it is an ordinary business breakfast. It was, in fact, a created stage where the unknowing straight man was the Petitioner. Counsel should have objected in order to meet his constitutional obligation of effective counsel. Petitioner has made a substantial showing of the denial of a constitutional right. This issue should be certified for appeal.

CONCLUSION

This is a high profile case that if reversed will bring great discredit on the Federal criminal justice system for its conviction based solely on the bought testimony of an admitted thief and swindler of Petitioner, a man in his 60s with a lifelong impeccable record. The conviction of only one of 49 bribery counts was achieved by failing to inform the jury of the correct elements of the bribery offense with which Petitioner was charged. Petitioner's counsel at trial failed to make objections to Echols's testimony. appellant counsel failed to raise the issue. The only issue is whether Petitioner has made a substantial showing of the denial of a constitutional right. Petitioner has done so. He is entitled to a certificate of appealability.

Respectfully submitted,

/s/ Roger C. Appell
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(205) 252-9462

CERTIFICATE OF SERVICE

I certify that I have this 14 day of November, 2000, served two copies of the above and foregoing on the Honorable Sally Q. Yates, Assistant United States Attorney, Northern District of Georgia, 1800 U. S. Courthouse, 75 Spring Street, S.W., Atlanta, Georgia 30303, and two copies on the Solicitor General of the United States, by U. S. Mail, postage prepaid and properly addressed.

/s/ Roger C. Appell
Roger C. Appell

APPENDIX

Appendix A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

OUGLAS L. FOWLKES, Movant, s. NITED STATES OF AMERICA, Respondent.	CRIMINAL NO. 1:93-cr-472-1 CIVIL ACTION FILE No. 1:98-cv-2842-RLV

JUDGMENT

The Court having DENIED the motion filed pursuant to Title 8, United States Code, Section 2255,

Judgement is hereby entered in favor of the Respondent and against the Movant.

Dated at Atlanta, Georgia this 10th day of April, 2000.

Luther D. Thomas
Clerk of Court

By: /s/ Pat Trago
Pat Trago
Deputy Clerk

iled: April 10, 2000
ntered: 4/10/00
n the Clerk's Office

uther D. Thomas
lerk of Court

y: /s/ Luther D. Thomas
eputy Clerk

ORDER

The defendant has filed a motion pursuant to 28 U.S.C. § 2255 [Doc. No. 65] asking this court to vacate, set aside, or correct his sentence. The defendant has also moved to amend his motion to raise an additional ground [Doc. No. 74]. These motions are now ripe for consideration.

On May 17, 1994, a federal grand jury in this district returned a 55-count superseding indictment, charging the defendant (in counts 1 through 49) with receiving corrupt payments from Harold Echols, a concessionaire doing business at Atlanta Hartsfield International airport, in violation of 18 U.S.C. § 666, and (in counts 50 through 55) with subscribing to false income tax returns under reporting his income, in violation of 26 U.S.C. § 7206 (1). Following a plea of not guilty of receiving a corrupt payment (count 49) and of filing false income tax returns (counts 50, 51, and 53); the jury acquitted him on the remaining counts. The defendant was sentenced to 41 months of imprisonment and was ordered to pay a fine of $25,000 and special assessment of $200. The conviction and sentence were affirmed on appeal. United States v. Fowlkes, 100 F.3d 970 (11th Cir. 1996). The defendant then filed his section 2255 motion.

Generally a defendant must raise issues attacking his conviction and sentence on direct appeal or they will be procedurally barred in a subsequent, collateral attack under section 2255. Since three of the four grounds raised in his section 2255 motion could have been raided on direct appeal, the defendant seeks to circumvent the general rule by alleging that his counsel were ineffective in asserting those grounds on direct appeal; he contends that the other ground (relating to his health) could not have been raised because the Supreme Court had not decided Koon v. United States, 518 U.S. 81 (1996) at the time of his sentencing and subsequent appeal. He further contends that he should be allowed to amend his motion to add an additional ground because of another recent decision of the Supreme Court. In his original motion, the defendant contends that his sentence should be reduced because of his health had deteriorated since

his incarceration and that his attorneys provided ineffective assistance by failing to raise the following issues:

(1) They failed to argue that because of his advancing age and deteriorating health his sentence was out of the heartland of the Sentencing Guidelines, under Koon, and that his sentence should be reduced accordingly.

(2) They failed to move to exclude the testimony of a government witness who had been given major charging and sentencing concessions by the government in exchange for his testimony, in violation of 18 U.S.C. § 201 (c) (2).

(3) They failed to object, and raise on appeal, his enhancement under U.S.S. G. § 31.1 for obstruction of justice.

(4) They failed to object to the introduction of an audio and video tape of a January 6, 1993, incident which the government had set up to allow Harold Echols to pay a proposed bribe to the defendant.

In his motion to amend, the defendant seeks to add the additional ground that the court erred, based on United States v. Sun-Diamond Growers of California, ____ U.S. ____, 119 S. Ct. 1402 (1999) in instructing the jury as to 18 U.S.C. § 666.

When asserting claims in a section 2255 motion that could have been raised on direct appeal, a defendant must show "cause" for his failure to raise those claims on direct appeal and "prejudice" resulting from the error. Cause may, as is alleged in the instant case, consist of ineffective assistance of counsel. Prejudice requires more than showing that an error created the possibility of prejudice; rather, the defendant must show that the alleged error worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions. See United States v. Reece, 119 F. 3d 1462 (11th Cir. 1997).

In analyzing an ineffective assistance of counsel claim, this court must follow the guidelines set out in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984). In Strickland the Supreme Court recognized the inherent problems in reviewing an attorney's actions after the fact.

Judicial scrutiny of counsel's performance must be highly

deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.

466 U.S. at 689, 140 s./Ct. at 2065.

To aid the courts in their review of ineffective assistance claims, the Supreme court provided the following test:

[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgement. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.

466 U.S. at 690, 104 S. Ct. at 2066.

Strickland further teaches that actual ineffectiveness claims "are subject to a general requirement that the defendant affirmatively prove prejudice." 466 U.S. at 693, 104 S. Ct. at 2067. To prove prejudice, the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694, 104 S. Ct. at 2068.

The defendant's first argument, that his attorneys were ineffective in failing to seek a downward departure because of his advancing age and deteriorating age is without merit, since this court does not believe that such failure would have been reversible error. *Koon* does allow a downward departure when the defendant can show circumstances outside the 'Heartland"; that is, a set of typical cases embodying the conduct that each quideline describes, Koon, 518 U.S. at 93, 116 s. Ct. at 2044. This court does not believe that advancing age or deteriorating health are factors that may be weighed when a downward depar-

ture is considered. The court specifically declines to follow United States v. Paradies, Criminal Action No. 1:93-CR-310 (Feb. 19. 1998). Because there was no basis for a downward departure, the defendant's counsel were not ineffective in seeking such departure.

The defendant's second argument is that his counsel were ineffective because they failed to seek the exclusion of the testimony of Harold Echols because such testimony was obtained in violation of 18 U.S.C. § 201 (c) (2) . This argument has been foreclosed by the Eleventh Circuit's decision in United States V. Lowery, 166 F.3d 1119 (11th Cir. 1999).

In his third ground, the defendant contends that his attorneys were ineffective in failing to object to his enhancement under U.S.C. G. § for obstruction of justice. This argument is without merit because the defendant's counsel did, in fact, object to the enhancement for obstruction of justice. In the written objections to the Presentence Investigation Report, counsel wrote:

Defendant objects to the application of the obstruction of justice enhancement. Though the jury apparently rejected the defendant's testimony regarding his state of mind in receiving the $350 from Harold Echols in January 1993, the testimony, nevertheless, represents the truthful testimony of Fowlkes regarding his belief as to why the money was paid to him.

Defendant's Objection to Presentence Investigation Report at 1. Additionally, at the time of sentencing, the defendant's counsel renewed the objection:

Your Honor, we object to the application of the obstruction of justice in this case. This is a case in which Mr. Fowlkes admitted receiving the money on the witness stand. It doesn't raise to the level of obstruction of justice.

Because counsel did object to the obstruction of justice enhancement, this ground can provide no basis for a finding of ineffective assistance of counsel.

In his fourth ground, the defendant contends that his counsel were ineffective in failing to object on proper grounds to the

introduction of the audio and video tape of the January 6, 1993, incident wherein he was shown accepting $350 from Harold Echols. However, the defendant presents only conclusory statements with respect to that incident. Simply because the defendant does not like the contents of the audio and video tapes of that meeting provides no basis for excluding those items of evidence. In his section 2255 motion and brief the defendant cites no rule of evidence of motion and brief the defendant cities no rule of evidence or any case authority that would have required the court to exclude this evidence. This ground is without merit.

In his motion to amend his section 2255 motion, the defendant urges this court to allow him to raise as an additional ground his allegation that the court erred in its charge with regard to the statutory elements of 18 U.S.C. § 666. This argument has already been rejected by the Eleventh circuit on direct appeal.

The defendant seeks to circumvent this ruling by referring to the Supreme Court decision in *Sun-Diamond Growers of California*. That Case, however, dealt with another code section, not the one at issue in the instant case. Because there has been no intervening change in the law with respect to the code section under which the defendant was convicted, this ground would provide no basis for relief.

The statutory language discussed in Sun-Diamond Growers of California provided criminal sanctions to anyone who "directly or indirectly gives, offers, or promises anything of value to any public official. . . for or because of any official act performed or to be performed by such official." 18 U.S.C. § 201 (c) (1) (A). In that case the district court held that to sustain a charge under that statute "it is not necessary for the indictment to allege a direct nexus between the value conferred to [the government official] by [the defendant] " and went on to charge the jury that "[i]t is sufficient if [the defendant] provided [the government official] with unauthorized compensation simply because he held public office. *"Sun-Diamond Growers of California.* ____ U.S. at ____, 119 S.Ct. at 1405. The Supreme court reversed the

defendant's conviction, holding that the government "must prove a link between the thing of value conferred upon a public official and a specific 'official act' for or because of which it was given." *Sun-Diamond Growers of California*. ____ U.S. at ____, 119 S. Ct. at 1411.

The code section under which fowlkes was convicted, however, provides criminal sanctions to anyone who "corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency." 18 U.S.C. § 666 (a) 1) (B). In charging the jury, this court tracked the statutory language and instructed the jury that it could convict the defendant only if it found that he had accepted Harold Echols' payment corruptly,. "intending to be influenced or rewarded in connection with" city transactions. The Supreme Court's holding in *Sun-Diamond Growers of California* does render this charge improper.

For the foregoing reasons the defendant's section 2255 motion [Doc. No. 65] is DENIED.[1] His motion to amend his section 2255 motion [Doc. No. 65] is DENIED. 1 His motion to amend his section 2255 motion [Doc. No. 74] is DENIED because of futility.

So ORDERED, this 3rd day of April, 2000.

/s/ Robert L. Vining, Jr.
ROBERT L. VINING, JR.
Senior United States District

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1 The defendant moved for summary judgement on his section 2255 motion [Doc. No. 76]. Because a motion to grant summary judgement on another notion is improper, that motion is also denied.

Appendix B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

NO. 00-12543-H

UNITED STATES OF AMERICA,	
	CRIMINAL ACTION NO. 1:93-CR-472-1
vs.	
DOUGLAS L. FOWLKS,	
	CIVIL ACTION NO. 98-CV-2842-RLV
Defendant.	

ORDER:

Because the defendant has failed to make a substantial showing of the denial of a constitutional right, his motion for a certificate of appealability (Denied.

So Ordered, this 17th day of May, 2000.

/s/ Robert L. Vining, Jr.
Robert L. Vining, Jr.
Senior United States District Judge

Appendix C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 00-12543-H

DOUGLAS L. FOWLKES,
a.k.a. Buddy,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court for the
Northern District of Georgia

ORDER:

Appellant's motion for a certificate of appealability is DENIED for failure to make a substantial showing of the denial of a constitutional right. 28 U.S.C § 2253 (c) (2).

/s/ GERALD BARD THOFLAT
UNITED STATES CIRCUIT JUDGE

Appendix D

UNITED STATES CODE ANNOTATED
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I—CRIMES
CHAPTER 31—EMBEZZLEMENT AND THEFT

Section 666. Theft or bribery concerning programs receiving Federal funds

(a) Whoever, if the circumstance described in subsection (b) of this section exists—
(1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof—
(A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that—
(i) is valued at $5,000 or more, and
(ii) is owned by, or is under the care, custody, or control of such organization, government, or agency; or

(B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more; or

(2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more;
shall be fined under this title, imprisoned not more than 10 years, or both.

(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

(c) This section does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.

(d) As used in this section—

(1) the term "agent" means a person authorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative;

(2) the term "government agency" means a subdivision of the executive, legislative, judicial, or other branch of government, including a department, independent establishment, commission, administration, authority, board, and bureau, and a corporation or other legal entity established, and subject to control, by a government or governments for the execution of a governmental or intergovernmental program;

(3) the term "local" means of or pertaining to a political subdivision within a State;

(4) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States; and

(5) the term "in any one-year period" means a continuous period that commences no earlier than twelve months before the commission of the offense or that ends no later than twelve months after the commission of the offense. Such period may include time both before and after the commission of the offense.

UNITED STATES CODE ANNOTATED
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I—CRIMES
CHAPTER 11—BRIBERY, GRAFT, AND CONFLICTS OF INTEREST

Section 201. Bribery of public officials and witnesses

(a) For the purpose of this section—

(1) the term "public official" means Member of Congress, Delegate, or Resident Commissioner, either before or after such official has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror;

(2) the term "person who has been selected to be a public official" means any person who has been nominated or appointed to be a public official, or has been officially informed that such person will be so nominated or appointed;

and

(3) the term "official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit.

(b) Whoever—

(1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—

(A) to influence any official act; or

(B) to influence such public official or person who has been selected to be a public official to commit or aid in committing,

or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(C) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of the lawful duty of such official or person;

(2) being a public official or person selected to be a public official,

directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for:

(A) being influenced in the performance of any official act;

(B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(C) being induced to do or omit to do any act in violation of the official duty of such official or person;

(3) directly or indirectly, corruptly gives, offers, or promises anything of value to any person, or offers or promises such person to give anything of value to any other person or entity, with intent to influence the testimony under oath or affirmation of such first-mentioned person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or with intent to influence such person to absent himself therefrom;

(4) directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other

person or entity in return for being influenced in testimony under oath or affirmation as a witness upon any such trial, hearing, or other proceeding, or in return for absenting himself therefrom;

shall be fined under this title or not more than three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may

be disqualified from holding any office of honor, trust, or profit under the United States.

(c) Whoever—

(1) otherwise than as provided by law for the proper discharge of official duty—

(A) directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official; or

(B) being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or

because of any official act performed or to be performed by such official or person;

(2) directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or for or because of such person's absence therefrom;

(3) directly or indirectly, demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon any such trial, hearing, or other proceeding, or for or because of such person's absence therefrom;

shall be fined under this title or imprisoned for not more than two years, or both.

(d) Paragraphs (3) and (4) of subsection (b) and paragraphs (2) and (3) of subsection (c) shall not be construed to prohibit the payment or receipt of witness fees provided by law, or the pay-

ment, by the party upon whose behalf a witness is called and receipt by a witness, of the reasonable cost of travel and subsistence incurred and the reasonable value of time lost in attendance at any such trial, hearing, or proceeding, or in the case of expert witnesses, a reasonable fee for time spent in the preparation of such opinion, and in appearing and testifying.

(e) The offenses and penalties prescribed in this section are separate from and in addition to those prescribed in sections 1503, 1504, and 1505 of this title.

UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART VI—PARTICULAR PROCEEDINGS
CHAPTER 153—HABEAS CORPUS

Section 2253. Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART VI—PARTICULAR PROCEEDINGS
CHAPTER 153—HABEAS CORPUS

Section 2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon,
determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder

would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART II—DEPARTMENT OF JUSTICE
CHAPTER 31—THE ATTORNEY GENERAL

Section 530B. Ethical standards for attorneys for the Government

(a) An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State.

(b) The Attorney General shall make and amend rules of the Department of Justice to assure compliance with this section.

(c) As used in this section, the term "attorney for the Government" includes any attorney described in > section 77.2(a) of part 77 of title 28 of the Code of Federal Regulations and also includes any independent counsel, or employee of such a counsel, appointed under chapter 40.

FEDERAL RULE OF EVIDENCE 403

Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or delay, waste of time, or needless presentation of cumulative evidence.